

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

February 9, 2001

IN RE:)	
)	
APPLICATION OF MEMPHIS NETWORKX, LLC,)	
FOR A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO PROVIDE)	
INTRASTATE TELECOMMUNICATION)	
SERVICES AND JOINT PETITION OF MEMPHIS)	DOCKET NO. 99-00909
LIGHT GAS & WATER DIVISION, A DIVISION)	
OF THE CITY OF MEMPHIS, TENNESSEE)	
("MLGW") AND A&L NETWORKS-TENNESSEE,)	
LLC ("A&L"), FOR APPROVAL OF AGREEMENT)	
BETWEEN MLGW AND A&L REGARDING JOINT)	
OWNERSHIP OF MEMPHIS NETWORKX, LLC.)	

**ORDER GRANTING IBEW'S MOTION TO WITHDRAW,
ESTABLISHING PROCEDURAL SCHEDULE, AND SETTING HEARING DATE**

This matter came before the Pre-Hearing Officer at a Pre-Hearing Conference held on January 29, 2001 to discuss the status of the action in light of the filing of the *Amendment to the Application of Memphis Networkx, LLC and Joint Petition of MLGW and A&L*.

STATUS OF ACTION

This matter first came before the Tennessee Regulatory Authority ("Authority") upon the filing of a Joint Petition by Memphis Light Gas and Water ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") requesting approval of the Joint Petitioners' Operating Agreement creating Memphis Networkx, LLC ("Memphis Networkx") and the Application of Memphis Networkx for a Certificate of Public Convenience and Necessity to provide intrastate intraLATA local exchange telecommunications services in Tennessee. The following parties were granted

intervention and have participated in this proceeding: NextLink, Tennessee Inc. (“NEXTLINK”); Time Warner Telecom of the MidSouth, L.P. and Time Warner Communications of the MidSouth, L.P. (collectively “Time Warner”); the Tennessee Cable Telecommunications Association (“TCTA”); BellSouth Telecommunications, Inc. (“BellSouth”); Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company, Inc., Tennessee Telephone Company (collectively the “TDS Telecom Companies”); International Brotherhood of Electrical Workers, Local 1288 (“IBEW”); and Office of the Attorney General through its Consumer Advocate Division (“Consumer Advocate”). Following numerous pre-hearing conferences and extensive discovery, the Authority conducted a Hearing on the merits of the Joint Petition and Application on July 17 - 21, 2000; September 11 - 15, 2000; and October 16 - 19, 2000.

At the conclusion of the Hearing, the Authority directed the parties to file post-hearing briefs, addressing the nine (9) issues set forth by the Pre-Hearing Officer at the outset of this proceeding.¹ The Authority also reserved its right to submit additional issues to the parties for briefing. On October 25, 2000, the Authority issued a Notice of Issues for Briefing directing the parties to brief four (4) additional issues. The post-hearing briefs on all issues were due to be filed no later than November 20, 2000.

On November 17, 2000, Memphis Networkx, MLGW, and A&L filed a *Notice of Additional Material Evidence and Motion for Suspension of Deadline for Filing Briefs and Findings of Fact and Conclusions of Law* (“Notice and Motion”). The Notice and Motion stated that A&L had agreed to sell its interest in Memphis Networkx to Memphis Broadband, LLC

¹ See Pages 5-6 of Exhibit A to *Order Approving and Adopting Report and Recommendation of Pre-Hearing Officer*, (June 29, 2000).

(“Memphis Broadband”) and that MLGW and Memphis Broadband intended to amend the Joint Petition and Application. Upon receipt of the Notice and Motion, the Authority issued a Notice on November 17, 2000 suspending the post-hearing briefing schedule pending further action by the Authority. On November 20, 2000, Time Warner and TCTA filed a *Response to Notice of Additional Evidence and Motion for Suspension of Deadline for Filing Briefs and Findings of Fact and Conclusions of Law*. In their response, Time Warner and TCTA stated that, in the absence of being able to examine the actual documentation pertaining to the sale agreement, they would reserve their rights to object to any amended application, to conduct additional discovery, and to request further hearings.

On November 21, 2000, the Authority addressed this matter during a regularly scheduled Authority Conference. The Authority voted unanimously to remand the case to the Pre-Hearing Officer and directed the Pre-Hearing Officer to rule on all preliminary matters not involving the merits of the case. On December 7, 2000, the IBEW filed a *Motion to Withdraw and Dismiss Petition to Intervene of International Brotherhood of Electrical Workers, Local 1288* (“Motion to Withdraw”). The IBEW explained in its Motion to Withdraw that the sale of A&L’s interest to Memphis Broadband “has alleviated the concerns of the IBEW with the Application of Memphis, LLC, as expressed in its Petition to Intervene.”²

On December 21, 2000, Memphis Networx, MLGW, and Memphis Broadband filed their *Amendment to the Application of Memphis Networx, LLC and Joint Petition of MLGW and A&L* (“Amended Application”). Along with the Amended Application, the Applicant and Joint Petitioners submitted the pre-filed testimony of Andrew P. Seamons on behalf of Memphis

² *Motion to Withdraw and Dismiss Petition to Intervene of International Brotherhood of Electrical Workers, Local 1288*, p. 1, (December 7, 2000).

Broadband, and the pre-filed supplemental testimony of Ward Huddleston, Jr. and William Larry Thompson on the behalf of Memphis Networkx and MLGW, respectively. The Amended Application stated that A&L had sold its membership interest in Memphis Networkx to Memphis Broadband and provided specific amendments to the Joint Petition and Application. The Amended Application also included an “Amended and Restated Operating Agreement of Memphis Networkx, LLC.”

Having received no comments or filings from the Intervenorrs relating to the Amended Application, with the exception of the IBEW’s Motion to Withdraw, the Pre-Hearing Officer issued a Notice on January 19, 2001, setting a Pre-Hearing Conference for January 29, 2001.

PRE-HEARING CONFERENCE

The Pre-Hearing Conference was convened on January 29, 2001 for the purposes of establishing threshold issues for briefing, determining whether additional discovery is necessary, considering stipulations and admissions of fact and documents, and establishing a schedule to completion. The parties in attendance were as follows:

Memphis Networkx, LLC (“Memphis Networkx”) and Memphis Light Gas & Water Division (“MLGW”);- **D. Billye Sanders, Esq.**, Waller, Lansden, Dortch & Davis, Nashville City Center, 511 Union Street, Suite 2100, Nashville, TN 37219-8966;

Memphis Networkx, LLC (“Memphis Networkx”) and Memphis Broadband, LLC (“Memphis Broadband”) - **John Knox Walkup, Esq.**, Wyatt, Tarrant & Combs, 2525 West End Avenue, Suite 1500, Nashville, TN 37203;

Time Warner Communications of the Mid-South, L.P. and the Tennessee Cable Telecommunications Association (“Time Warner” and “TCTA”) - **Charles B. Welch, Jr., Esq.**, Farris, Warfield & Kanaday, PLC, SunTrust Center, 424 Church Street, Suite 1800, Nashville, TN 37219-2327;

Time Warner Telecom of the Mid-South, L.P., (“Time Warner Telecom”) - **John M. Farris, Esq.**, Farris, Mathews, Branan, Bobango & Hellen, One Commerce Square, Suite 2000, Memphis, TN 38103;

Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter (“Consumer Advocate”) - **Vance Broemel**, Esquire, Office of Attorney General, 425 5th Avenue North, Cordell Hull Building, Nashville, TN 37243-0500; and

International Brotherhood of Electrical Workers, Local 1288 (“IBEW”) - **Jeff Bloomfield, Esq.**, Allen, Godwin, Morris, Laurenzi & Bloomfield, P.C., 200 Jefferson Avenue, Suite 1400, Memphis, TN 38103 (participated telephonically).

1. The IBEW’s Motion to Withdraw Petition to Intervene

During the Pre-Hearing Conference, the Pre-Hearing Officer first considered the Motion to Withdraw filed by the IBEW. No party filed an objection or expressed comments in opposition to the IBEW’s Motion to Withdraw prior to or during the Pre-Hearing Conference. Upon hearing no objections, the Pre-Hearing Officer granted the Motion to Withdraw. In addition, the Pre-Hearing Officer determined that the post-hearing brief filed by the IBEW on November 17, 2000 and the evidence presented by or elicited from the IBEW and its witnesses would remain a part of the record in this proceeding.

Counsel for Memphis Networx and MLGW did not oppose the IBEW’s withdrawal from the case but objected to the Pre-Hearing Officer’s decision to retain in the record of this proceeding all evidence and filings put forth by the IBEW during the case. Counsel for Memphis Networx and MLGW argued that such action would be inappropriate but did not provide any legal grounds for opposing the Pre-Hearing Officer’s decision. The Pre-Hearing Officer ruled that his decision would stand however, counsel for Memphis Networx and MLGW could submit a filing setting forth legal grounds at a later date. Time Warner requested the opportunity to respond should the Applicant and Joint Petitioners make such a filing. The Pre-Hearing Officer determined that all Intervenors could respond accordingly.

2. Discovery as to the Amended Application

The Pre-Hearing Officer next addressed the need for additional discovery regarding the Amended Application. Time Warner advised that it wished to submit written discovery and, if necessary, conduct depositions. The Consumer Advocate asserted that although it did not intend to conduct discovery at this time it did not object to such additional discovery. Memphis Networx, MLGW, and Memphis Broadband did not object to discovery, but argued that discovery should be limited and conducted in an expeditious manner.

Upon hearing from the parties, the Pre-Hearing Officer determined that additional discovery would be necessary as a result of the filing of the Amended Application and additional pre-filed testimony, but limited the scope of such discovery to the new issues raised by the Amended Application and in the pre-filed testimony submitted therewith. The Pre-Hearing Officer, with the assistance of the parties, established the following procedural schedule:

Discovery requests shall be filed no later than **Monday, February 5, 2001**;

Objections to discovery requests shall be filed no later than **Monday, February 12, 2001**;

Responses to discovery requests and Motions to Compel shall be filed no later than **Thursday, February 15, 2001**; and

Pre-filed rebuttal testimony shall be filed no later than **Thursday, March 1, 2001**.

The Pre-Hearing Officer determined that depositions would be permitted, but must be completed prior to **March 1, 2001**. Any party may file a timely motion with the Pre-Hearing Officer concerning the taking of depositions.

3. Briefing of Threshold Issues

The Pre-Hearing Officer determined that certain issues from the list submitted earlier to the parties on October 25, 2000 should be briefed before the Hearing proceeds in this matter.

The Pre-Hearing Officer directed the parties to file briefs on three (3) threshold issues no later than **Thursday, March 1, 2001**. The list of threshold issues, which is attached to this Order as **Exhibit A**, was provided to the parties during the Pre-Hearing Conference on January 29, 2001.

HEARING DATE

During the Pre-Hearing Conference, the Applicant and Joint Petitioners requested that the Pre-Hearing Officer proceed to set a Hearing date in this matter. The Pre-Hearing Officer was unable to act on that request during the Pre-Hearing Conference. The Pre-Hearing Officer has since been able to obtain dates for a Hearing and hereby sets this matter for Hearing to begin on **Monday, March 26, 2001 at 9:00 a.m.** The scope of this Hearing shall be limited to issues surrounding the Amended Application which was filed on December 21, 2000. The parties have stated that this Hearing can be concluded within three (3) days.

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Withdraw and Dismiss Petition to Intervene of International Brotherhood of Electrical Workers, Local 1288* is granted. The post-hearing brief filed by the IBEW on November 17, 2000 and all evidence put forth by or elicited from the IBEW and its witnesses shall remain a part of the evidentiary record in this matter. Counsel for Memphis Networx and MLGW shall have until **February 23, 2001** to file legal grounds for opposing the inclusion of this evidence in the record. If parties wish to respond, they must do so no later than **March 1, 2001**. The Pre-Hearing Officer will consider all filings and issue a decision thereafter.
2. All discovery and the filing of pre-filed rebuttal testimony shall proceed in accordance with the schedule set forth herein and shall be completed no later than **Thursday, March 1, 2001**.

3. The parties shall file briefs addressing the three (3) threshold issues, the list of which is attached hereto as **Exhibit A**, no later than **Thursday, March 1, 2001**.

4. All filings in this docket shall be made with the Authority not later than **2:00 p.m.** on the date the filings are due.



J. RICHARD COLLIER
ACTING AS PRE-HEARING OFFICER

ATTEST:



K. David Waddell, Executive Secretary

DOCKET # 99-00909
ISSUES TO BE BRIEFED

1.
 - a.. Do Tenn. Code Ann. § 65-25-231(a)(2) and § 7-52-402 apply to the Telecommunications Division of the Electric Division of Memphis Light Gas & Water?
 - b. Does Tenn. Code Ann. § 65-25-231(a)(2), § 7-52-402, or any other statute permit the equity investment in Memphis Network by the Telecommunications Division of the Electric Division of Memphis Light Gas & Water to Memphis Network, LLC?
2. Please identify and explain the criteria the Authority should use when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).
3.
 - a. Was Memphis Light, Gas & Water required to issue a Request For Proposal?
 - b. What procedural requirements must Memphis Light, Gas & Water follow when proceeding through the Request for Proposal process?
 - c. Assuming Memphis Light, Gas & Water was not required to issue a Request for Proposal, was it bound to follow the procedural requirements discussed in the answer to b. once it chose to issue a Request for Proposal?
 - d. Assuming Memphis Light, Gas & Water was required to issue a Request for Proposal, but failed to follow the requirements discussed in the answer to b., how is the transfer of interest from A&L Networks-Tennessee, L.L.C. to Memphis Broadband affected?

